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May 13, 2008

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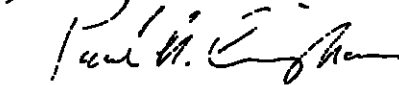
Anne K. Quinlan, Esquire
Acting Secretary
Surface Transportation Board
Office of the Secretary
395 E Street, S W.
Washington, DC 20423-0001

**Re: Canadian National Railway Company and Grand Trunk Corporation Control-
EJ&E West Company (STB Finance Docket No. 35087)**

Dear Ms. Quinlan:

Enclosed for filing in the above referenced docket please find Applicants' Request for Establishment of Time Limits for NEPA Review and Final Decision (CN-33). Please note that we have requested expedited consideration for this filing

Very truly yours,



Paul A. Cunningham

Enclosure

cc All parties of record

EXPEDITED CONSIDERATION REQUESTED

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35087

**CANADIAN NATIONAL RAILWAY COMPANY
AND GRAND TRUNK CORPORATION
– CONTROL –
EJ&E WEST COMPANY**

**APPLICANTS' REQUEST FOR ESTABLISHMENT OF
TIME LIMITS FOR NEPA REVIEW AND FINAL DECISION**

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May 13, 2008

EXPEDITED CONSIDERATION REQUESTED

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35087

**CANADIAN NATIONAL RAILWAY CORPORATION
AND GRAND TRUNK CORPORATION
– CONTROL –
EJ&E WEST COMPANY**

**APPLICANTS' REQUEST FOR ESTABLISHMENT OF
TIME LIMITS FOR NEPA REVIEW AND FINAL DECISION**

Pursuant to 40 C.F.R. § 1501.8, Canadian National Railway Company and Grand Trunk Corporation (together "CN" or "Applicants")¹ respectfully request the Board to establish time limits for this proceeding governing the remainder of the environmental review process and the date of the Board's final decision. Time limits are warranted because, even though the scope of the Board's NEPA review has now been defined,² the significant public benefits of the Transaction have been put at risk by the lack of certainty regarding the likely date for concluding that review process and this proceeding. The Board is required, upon request, to impose time limits, and the time limits suggested by CN here are reasonable given the circumstances of this case. Applicants are seeking expedited consideration of their request because the lack of clear

¹ Applicants incorporate by reference the short forms and abbreviations set forth in the Table of Abbreviations at CN-2 at 8-11.

² See Notice of Availability of the Final Scope of Study for the Environmental Impact Statement (STB served Apr. 28, 2008) ("Scoping Order").

deadlines for this proceeding hinders Applicants from making fundamental business decisions about how to address delay and congestion in Chicago and expedited consideration will prejudice no other party to this proceeding.

I. Background & Introduction

On October 30, 2007, Applicants filed a Railroad Control Application ("Application") proposing acquisition and control of EJ&E West Company ("Transaction"). The Application was predicated on the terms of the Stock Purchase Agreement ("SPA") between Applicants and EJ&E (an indirect wholly owned subsidiary of United States Steel Corporation ("USS"), with which CN conducted the substantive negotiations leading to the SPA). In negotiating the SPA, Applicants and EJ&E had anticipated the risk of some delay in the Board's review of the Transaction, and the SPA therefore set a closing date of September 1, 2008, with a conditional fallback deadline of December 31, 2008, which was the longest period to which USS would agree. The SPA allowed more than twice the time allotted by Congress for review of what the parties correctly anticipated would be a "minor" transaction. The parties had every reason, based on the statute, and the Board's rules and precedent, to believe that these deadlines would be sufficient to accommodate any required regulatory and environmental review.

By its decision served November 26, 2007, the Board accepted the Application and designated the Transaction as "minor" under the Board's rules. Decision No. 2, slip op at 9. Minor transactions are those that do not involve two or more class I railroads, and for which a determination can be made either: (1) that the transaction clearly will not have any anticompetitive effects, or (2) that any anticompetitive effects of the transaction will clearly be outweighed by the transaction's anticipated contribution to the public interest in meeting

significant transportation needs. 49 C F R. § 1180.2(b) The Board concluded that the Application satisfied this standard.

Because the Transaction is “minor,” the ICC Termination Act of 1995, 49 U.S.C. §§ 10101-16106 (“ICCTA”), required the Board to issue a final decision within 180 days of filing of the Application (i.e., by April 25, 2008) 49 U.S.C. § 11325(d). Accordingly, when the Board accepted the Application, it stated that it planned to issue its final decision by April 25, 2008, with an effective date 30 days later. Decision No. 2, slip op. at 12. A decision by April 25 would have complied with ICCTA’s deadline. However, the Board also determined that its Section of Environmental Analysis (“SEA”) would prepare an environmental impact statement (“EIS”), rather than an environmental assessment (“EA”),³ to fulfill its responsibilities under the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370f (“NEPA”). And, without any briefing on the point, the Board decided to extend the final decision date beyond the statutory deadline if necessary to accommodate completion of the EIS. Decision No. 2, slip op. at 13-16.

In past control proceedings, the Board has set time limits for completing the environmental review – most notably in the *Conrail* proceeding, the only other control proceeding since enactment of NEPA in 1970 for which it has required an EIS.⁴ The Council on

³ Under Board rules, an EA is “a concise public document for which the Board is responsible that contains sufficient information for determining whether to prepare an Environmental Impact Statement or to make a finding of no significant environmental impact.” 49 C.F.R. § 1105.4(d)

⁴ *CSX Corp. – Control & Operating Leases/Agreements – Conrail – Inc.*, STB Finance Docket No. 33388 (“*Conrail*”). The Board also issued an environmental review schedule in *CN/IC*, even though that transaction only required an EA. Notice of Environmental Review Process Schedule, slip op. at 1, *Canadian Nat’l Ry – Control – Ill. Cent. Corp.*, STB Finance Docket No. 33556 (STB served Sep. 14, 1998). Despite the size and complexity of the transaction in the *UP/SP* merger proceeding (*Union Pac. Corp. – Control & Merger – S. Pac. Rail Corp.*, 1 S.T.B. 233 (1996) (“*UP/SP*”), *aff’d sub nom. W. Coal Traffic League v. STB*, 169 F.3d 775 (D.C. Cir.

Environmental Quality ("CEQ"), which is responsible for implementing NEPA, has issued regulations that encourage agencies to set time deadlines for environmental review, 40 C.F.R. § 1501.8, and, in this case, require the Board to impose deadlines upon request of Applicants *Id* § 1501.8(a) ⁵ Other agencies within DOT routinely use schedules to "reduce the overall time[] needed to complete the environmental review process" and "expedit[e] project delivery,"⁶ while regulations and policies of agencies outside DOT with significant environmental responsibilities also call for setting time limits pursuant to 49 C.F.R. § 1501.8(a) ⁷

1999)), the Board required only an EA 1 Environmental Assessment at 1-5, *Union Pac. Corp. – Control & Merger – S. Pac. Rail Corp.*, Finance Docket No. 32760 (STB served Apr. 12, 1996)

⁵ The time limits must be "consistent with the purposes of NEPA and other essential considerations of national policy." 40 C.F.R. § 1501.8(a). As explained more fully below, the time limits CN is proposing are fully consistent with the national policy expressed by Congress in ICCTA, and there is no apparent reason why they should prevent the Board from completing its environmental review consistently with the purposes of NEPA.

⁶ Federal Highway Administration, SAFETEA-LU Environmental Review Process Final Guidance at 35 (Nov. 15, 2006), *available at* <http://www.fhwa.dot.gov/hep/section6002/section6002.pdf> (issuing joint guidance of Federal Highway Administration and Federal Transit Administration). *See also* Federal Aviation Administration, National Environmental Policy Act (NEPA) Implementing Instructions for Airport Projects, Order 5050.4B, sec. 904.d (Apr. 28, 2006), *available at* http://www.faa.gov/airports_airtraffic/airports/resources/publications/orders/environmental_5050_4/media/5050-4B_complete.pdf (providing that responsible FAA official should set appropriate time limits on request of airport sponsor).

⁷ For example, Environmental Protection Agency ("EPA") regulations implementing NEPA require the agency, "upon request of an applicant and consistent with 49 C.F.R. 1501.8, [to] set time limits on the NEPA review appropriate to individual proposed actions." 40 C.F.R. § 6.103(b)(7). Similarly, U.S. Army Corps of Engineers regulations provide that, once the Corps has decided to prepare an EIS, "district commanders will establish a time schedule for each step of the process based upon considerations listed in 40 CFR 1501.8 and upon other management considerations." 33 C.F.R. § 230.17. In addition, the Department of the Interior encourages agencies preparing an EIS "to set time limits of their own and to respond favorably to applicant requests for time limits and set them consistent with the requirements of 40 CFR 1501.8." Department of the Interior, Departmental Manual, pt. 516, sec. 2.7, *available at* http://elips.doi.gov/app_dm/act_getfiles.cfm?relnum=3675

Nonetheless, in this proceeding, the Board did not adopt a time limit for environmental review. Given the vocal protests of affected parties and their representatives, the Board was understandably concerned not to prematurely judge what might be required for its environmental review. The Board stated that "the time the EIS will take to prepare cannot be determined ahead of time because there is no way to predict in advance all of the specific issues that may arise." Decision No. 2, slip op. at 16. At this stage of the proceeding, however, with months of analysis and scoping complete, the essential environmental issues are well defined. The Board should therefore be able to meet its legal duty to establish a schedule for expeditious completion of the EIS and for issuing a final decision in this proceeding.

CN respectfully requests that the Board do so. CN also requests that the Board set intermediate time limits for the major milestones of the environmental review. See 40 C.F.R. § 1501.8(b)(2)(iii)-(vii).⁸ For the reasons discussed below, CN proposes the following schedule:

- | | |
|--------------------------|-------------------|
| • Draft EIS served | July 15, 2008 |
| • Draft EIS comments due | September 2, 2008 |
| • Final EIS served | November 3, 2008 |
| • Final decision served | December 1, 2008 |

CN makes this request for several reasons.

First, the significant public benefits of the Transaction are at risk because of continuing uncertainty as to the terminal date of the environmental review process and the proceeding. As has been clear from the beginning, the Transaction will substantially enhance the efficiency of

⁸ Setting time limits would be consistent with the terms of SEA's Memorandum of Understanding ("MOU") with CN and HDR (the third-party contractor on this case, as provided in 40 C.F.R. § 1506.5(c) and 49 C.F.R. § 1105.10(d)), requiring preparation of a work plan that includes "[t]he projected schedule for completing the various tasks described." MOU § VI A (2) (attached as Exhibit 1).

the rail transportation network in the Chicago area. The public benefits of the Transaction include environmental as well as transportation benefits. These benefits are at risk because CN may be forced to abandon the Transaction if it cannot close as required under the terms of the SPA

Second, CEQ regulations require an agency to establish deadlines upon request of an applicant, provided that the deadlines are consistent with the purposes of NEPA and other considerations of national policy 40 C.F.R. § 1501.8(a) ⁹ Even apart from the requirements of CEQ regulations, the statutory deadlines under ICCTA, which entitled CN to a final decision within 180 days of the filing of the Application, require an expeditious result NEPA does not excuse SEA or the Board from complying with ICCTA's statutory deadlines ¹⁰ While CN has recognized that the balance between expeditious regulatory review and thorough environmental review is important, and has cooperated fully with SEA's effort, the present status of SEA's inquiry, ICCTA's mandate, and the public interest require that the EIS process not be permitted to jeopardize the Transaction.

Third, the time limits requested by CN are both reasonable and feasible With the completion of the extensive scoping process, it is evident that the issues in this proceeding are

⁹ In discussing the environmental rules now found at 49 C.F.R. Part 1105, the Board's predecessor, the Interstate Commerce Commission ("ICC"), made clear that it follows CEQ regulations except where compliance is inconsistent with the Commission's statutory requirements *Revision of National Environmental Policy Act Guidelines*, 45 Fed. Reg. 79,810, 79,811 (1980) Here, the requirements of the CEQ regulations to establish deadlines on the environmental review process are fully consistent with ICCTA's establishment of deadlines for a final determination by the Board.

¹⁰ See *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n*, 426 U.S. 776, 788 (1976) ("where a clear and unavoidable conflict in statutory authority exists, NEPA must give way"), *City of New York v. Minetta*, 262 F.3d 169, 178 (2d Cir. 2001) (recognizing that an "exception to the EIS requirement arises when a statute imposes short, mandatory deadlines on an agency, thereby rendering compliance with NEPA's EIS requirement impossible").

not novel and are well enough defined for the establishment of a schedule. Moreover, there is no apparent reason why SEA, armed with an experienced third-party consultancy with an assigned staff of over 250 persons¹¹ (all of which is being funded by CN, in accordance with the Board's regulations), cannot conclude its environmental inquiry by the proposed date of November 3, over a year after the filing of the Application.¹²

Fourth, the fact that the Transaction has engendered some controversy provides no basis for a longer process than ICCTA allows or than CN proposes, but instead makes it even more important that the Board adopt those deadlines. With the full cooperation of CN, SEA has already undertaken a thorough, months-long process of community scoping meetings and meetings with other stakeholders, and has received and considered oral and written scoping comments. SEA also has a process in place for analyzing the potential environmental impacts of the Transaction, and if interested parties have concerns with how that analysis was conducted, there is no reason why the proposed comment period on the Draft EIS is not sufficient for raising them. Thus, there is no need for a longer schedule because the one proposed by Applicants will

¹¹ There can be no real doubt that SEA has adequate resources. CN has already accrued roughly \$7 million in charges for SEA's third-party environmental consultants. Unless properly kept in check, costs could ultimately exceed \$15 million. The portion of EJ&E that CN is acquiring encompasses 158 route miles with only 99 public grade crossings on the portion where rail traffic will increase. Thus, in direct support of the Board's NEPA review, CN may be paying as many as 2.5 third-party consultancy staff members for every affected grade crossing on EJ&EW and almost \$100,000 of consulting-fee costs per EJ&EW route mile, and this amount does not include the fees CN is paying to its own environmental consultants, or the resources CN has devoted to collecting data requested by SEA. To put this amount in perspective, the total annual STB budget is approximately \$26.5 million.

¹² As CEQ has determined, even large complex projects "would require only about 12 months for the completion of the entire EIS process." Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026, 18,037 (1981). The U.S. Army Corps of Engineers NEPA rules, which often apply to large, complex projects, also state, citing CEQ regulations, that "[t]he time required from the decision to prepare an EIS to filing the final EIS normally should not exceed one year." 33 C.F.R. § 230.17.

provide more than enough time for SEA to complete its review and analysis of the environmental impacts of the Transaction and for concerned parties to participate further in that process as appropriate.

By contrast, there is every reason to believe that extending the environmental review period and the proceeding beyond the period proposed here by CN would not only be at odds with ICCTA but would be contrary to the public interest and serve no legitimate goal of NEPA. Opponents of the Transaction have made it clear that they hope to use the environmental process not only as a means to facilitate a hard environmental look,¹³ but also as a means to stall the Transaction until it dies or to impose onerous mitigation that would make the Transaction economically infeasible.¹⁴ But the NEPA process is not a plebiscite,¹⁵ and is not intended to be

¹³ “NEPA requires not that an agency engage in the most exhaustive environmental analysis theoretically possible, but that it take a ‘hard look’ at relevant factors.” *Nw. Envtl. Advocates v. Nat’l Marine Fisheries Serv.*, 460 F.3d 1125, 1139 (9th Cir. 2006), *see also* *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 508 F.3d 508, 526 (9th Cir. 2007) (“the agency must take a ‘hard look’ at the impacts of its action by providing a reasonably thorough discussion of the significant aspects of the probable environmental consequences.”) (internal quotations omitted)

¹⁴ *See, e.g.*, Susan DeMar Lafferty, *Coalition to Oppose Rail Merger Picks Up Steam*, Southtown Star (Chicago, IL), April 20, 2008, *available at* <http://www.southtownstar.com/neighborhoodstar/frankfort/903032,042008trains.article> (“Talk has switched from efforts to mitigate noise, traffic congestion, and increased hazardous materials to flat out opposition to the purchase.”); *Railroad deal should be nixed if upgrades aren’t made*, Southtown Star (Chicago, IL), May 4, 2008, *available at* <http://www.southtownstar.com/news/opinion/editorials/928493,050408edit.article> (“we are in absolute agreement that this deal not be approved if CN does not cover a substantial portion of the cost of building under- and over-passes that will definitely be needed. It should be a deal-breaker, and we hope the transportation board sees it the same way.”); Chad Brooks, *Barrington president says EJ&E sale must be halted*, Daily Herald (Chicago, IL), May 13, 2008, *available at* <http://www.dailyherald.com/story/?id=189832&src=1> (President of Village of Barrington stating “the village’s active role in making sure the deal is not approved will continue throughout the year”).

¹⁵ As CEQ recognizes, “[c]ommenting is not a form of ‘voting’ on an alternative. The number of negative comments an agency receives does not prevent an action from moving forward.” *See* Council on Environmental Quality, *A Citizen’s Guide to the NEPA: Having Your Voice Heard at*

wielded as a weapon by project opponents who wish to wrest from a reviewing agency the decision of whether or not a proposed project may go forward. The Board should not allow the mere fact of vocal opposition that presents no novel or intractable analyses to frustrate a Transaction that would provide significant regional and national public benefits.

II. The Public Interest in the Transaction Is Being Put at Risk by Uncertainty Regarding the Schedule for NEPA Review and the Board's Final Decision

Since at least as early as the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 ("4R Act"), Congress has sought to "encourage mergers, consolidations and joint use of facilities that tend to rationalize and improve the Nation's rail system." S. Rep. No. 94-499 at 20 (1975) (Senate committee report on 4R Act), *reprinted in* 1976 U.S.C.C.A.N. 14, 34.¹⁶ In the Staggers Rail Act of 1980, Congress enacted time limits for regulatory review of rail control and merger proposals, including the 180-day time limit applicable in this case, in order to provide further encouragement for publicly beneficial rail control and merger proposals.¹⁷ In ICCTA, Congress reenacted the 180-day time limit for review of minor transactions (while shortening even further the time limits set in the Staggers Act for review of major rail transactions).

From the beginning of this proceeding, it has been clear that CN's proposed control of EJ&EW is in the public interest, and is therefore the kind of transaction that Congress intended

27 (Dec. 2007) ("*Citizen's Guide*"), available at http://www.nepa.gov/ntf/Citizens_Guide_Dec07.pdf

¹⁶ In the 4R Act, Congress provided new, expedited procedures for regulatory review of rail control applications. because, in the words of the Senate committee, "[t]he cumbersome, slow process of . . . processing merger proposals . . . ha[d] drastically slowed change needed in the industry." *Id.* at 2-3, 1976 U.S.C.C.A.N. at 16.

¹⁷ Pub. L. No. 96-448, § 228(d), 94 Stat. 1895, 1932 (enacting 49 U.S.C. § 11345(d) (now § 11325(d))).

to encourage by mandating expedited regulatory procedures. When the Board accepted the Application as one for a “minor transaction,” it did so because “it appears on the face of the application that the efficiency and other public interest benefits would clearly outweigh whatever anticompetitive effects may exist.” Decision No. 2, slip op. at 10. Since the Board’s acceptance of the Application, there have been few objections to the Transaction on competitive grounds, and those objections, CN respectfully submits, have been effectively rebutted. *See, e.g., Applicants’ Response to Comments, Requests for Conditions, and Other Opposition and Rebuttal in Support of the Application* (CN-29) (filed March 13, 2008), *Applicants’ Surrebuttal to Additional Comments Filed On or After March 13, 2008* (CN-31) (filed Apr. 28, 2008). And even if this were not the case, none of those objections outweighs the substantial public benefits of the Transaction, which are clear and have been recognized by a broad spectrum of shippers, rail carriers, business groups, communities, and government officials. *See* CN-29, at 7-11.

Among other things, the Transaction would insure a more efficient and reliable rail transportation system at a lower cost; over time, reduce rail congestion and increase rail capacity in Chicago’s urban core; and increase flexibility for CN operations, positively benefiting its current and future shippers. *See* CN-2 at 23. The Transaction represents a privately funded measure to partially remedy costly and inefficient rail congestion in Chicago and to streamline rail operations, which is particularly critical given the evident absence of meaningful government funding for CREATE or any other possible regional solution.¹⁸

¹⁸ *See* Letter from Richard M. Daley, Mayor, City of Chicago to Anne K. Quinlan, Secretary, Surface Transportation Board (Jan. 15, 2008), available at [http://www.stb.dot.gov/Ect1/ecomcorrespondence.nsf/PublicIncomingByDocketNumber/E734AD64D5DD7A6A852573E900555E4F/\\$File/01176011508DALEY.LOCL60604SN.PDF?OpenElement](http://www.stb.dot.gov/Ect1/ecomcorrespondence.nsf/PublicIncomingByDocketNumber/E734AD64D5DD7A6A852573E900555E4F/$File/01176011508DALEY.LOCL60604SN.PDF?OpenElement) (“We believe this transaction will advance specific CREATE objectives more expeditiously than envisioned by CREATE and without the need for public funding.”), Preliminary Comments of U.S. Department of Transportation (DOT-2) at 3, (filed January 25, 2008) (the proposed Transaction “would have

Rail congestion and delay are significant and widely recognized problems in the Chicago area. Investments in greater railroad efficiency in Chicago are necessary for railroads to remain competitive with the trucking industry and to keep their customers competitive in their markets. Keeping freight from shifting from rail to trucks has important public benefits, in that it increases capacity on highways, reduces the pressure to construct additional costly, disruptive highway capacity, reduces fuel consumption and greenhouse gas emissions, and decreases the risk that hazardous materials will be spilled.¹⁹ This Transaction is likely but the first of many by railroads to address congestion in Chicago and nationally without seeking public funding, and the Board risks losing the public benefits of these private solutions if potential applicants are led to expect that they may face undue regulatory risk, expense, and delay²⁰

The Transaction would also benefit communities along CN's current lines to and from Chicago. Communities inside the EJ&E suburban arc (with a larger total population than that of

the additional benefit of advancing a central goal of the Chicago Region Environment and Transportation Efficiency ('CREATE') project . . ."). See also *Attacking the Gridlock*, Chicago Tribune, Apr. 24, 2008, at 24, available at <http://www.chicagotribune.com/news/chicagoedit2apr24,0,4821769.story> (CN's investment in EJ&E "would ease highway traffic congestion by adding new capacity to carry freight to and through Chicago" and "could be the catalyst needed to begin unsnarling the costly rail congestion [in Chicago]"); *State should get on board to modernize railroads*, Business Ledger, May 12, 2008, available at <http://www.thebusinessledger.com/Home/Archives/InTheNews/tabid/85/mid/393/newsid393/338/Default.aspx>

¹⁹ The Government Accountability Office has found that "[n]ew rail capacity . . . has the potential to benefit the public by improving traffic flow, air quality, and safety at the national, state, and local levels." U.S. Gov't Accountability Office, *Freight Railroads: Industry Health Has Improved, but Concerns about Competition and Capacity Should Be Addressed* 53 (Oct. 2006), available at http://www.gao.gov/new_items/d0794.pdf.

²⁰ Both UP and NS filed environmental comments in this proceeding that raised concerns about the need for the Board to encourage investments to reduce congestion in Chicago. Environmental Comments of Norfolk Southern Railway Company at 3 (filed Feb. 15, 2008), Environmental Comments of Union Pacific Railroad Company at 5 (filed Feb. 15, 2008). (attached as Exhibits 2 & 3).

the suburban communities along that arc) would benefit from the decreases in noise, congestion, and delay that would result from a reduction in train traffic. CN trains cross 178 grade crossings inside the EJ&E arc (128 of which have Average Daily Traffic (“ADT”) above 2,500 vehicles), but would cross only 99 on EJ&EW (of which only 71 have ADTs above 2,500 vehicles). While trains must currently creep through the congested and suboptimal infrastructure in downtown Chicago, they would, for the most part, be able to operate unhindered along EJ&E, increasing efficiency and reducing the overall impacts on vehicle delay. CN is not just shifting trains from one location to another – it is streamlining its operations to increase the efficiency and decrease the overall environmental effects of its service and that of other railroads that operate to, from, and through the Chicago gateway.

The Board risks precluding the public benefits of this Transaction because, under the terms of the SPA, if the deal is not closed by December 31, 2008, either party may be able to terminate the Agreement, and neither party may be able to compel the other to close. SPA § 2.3, CN-2 at 259. Although the SPA may be amended by mutual consent to provide for a later closing date, there is no reason for the Board to expect USS to agree to such an extension, if at all, absent a reliable completion date for the regulatory process. The Board should set such a date early enough to permit reasoned consideration by CN and USS – before the “drop-dead” date set by the SPA – as to whether to pursue the Transaction if approved and as conditioned by the Board, and to provide sufficient time for the parties to prepare in an orderly manner for closing in conformity with any requirements that may have been imposed in the final order.

If the parties cannot close by December 31, CN could be denied the option of ever closing, and it would have lost over a year’s worth of time and millions of dollars in expenses related to the Transaction – principally the third-party consultants’ fees related to the Board’s

NEPA review.²¹ Because this Transaction is important to CN, it is willing to continue to pursue it despite the extended environmental review schedule, provided it receives substantial assurance that regulatory approval can and will be completed by December 1. If the Board cannot meet that date, CN would like to be informed as soon as possible so that it can properly assess its options

Given the widely recognized need to reduce railroad congestion in Chicago,²² it is unlikely that EJ&E is going to remain as underutilized as it is today. And, whether or not this Transaction is approved, USS cannot be expected to let the unused EJ&E capacity go to waste indefinitely. Such capacity cannot be inventoried, and its value cannot be realized except through usage. USS therefore has a strong incentive, if CN is not permitted through this Transaction to ease rail congestion in downtown Chicago, to make its under-used EJ&E line available for use by CN or to other railroads that are seeking ways to move their traffic more efficiently and help relieve the rail congestion in downtown Chicago. Thus, if this Transaction is not consummated, alternatives, including increased interchange and haulage, which would not require NEPA review, will likely be available that would nonetheless allow CN, other carriers, or both to move additional traffic over EJ&E.

These solutions would not likely be as efficient or as beneficial to the public interest or CN itself as the proposed Transaction, so CN remains committed to the Transaction. But it cannot prudently acquiesce in paying millions of dollars more for completion of the

²¹ See *supra* note 11.

²² See, e.g., Exhibit 2 at 3 and Exhibit 3 at 5.

environmental review if there is a significant risk that the Transaction will be jeopardized or foreclosed by the long time taken to conduct that review²³

III. The Board Should Impose Deadlines in Accordance with CEQ Regulations and Consistent With Congress' Intent in Establishing ICCTA's Statutory Deadlines

CEQ regulations encourage agencies to set deadlines for environmental review, 40 C.F.R. § 1510.8, and they require an agency to impose deadlines upon request of an applicant, provided that the limits are consistent with the purposes of NEPA and other essential considerations of national policy. 40 C.F.R. § 1501.8(a). The time limits proposed by CN are consistent with the purposes of NEPA because they allow sufficient time for the Board to take the required "hard look" at the environmental impacts of the proposed action.²⁴ The requested time limits are also consistent with other essential considerations of national policy, as they recognize Congress's intent, through ICCTA, that applications for "minor" transactions be reviewed expeditiously.

The factors under the CEQ rules that the Board may consider in determining time limits also support the time limits requested by CN. The Board has already taken account of the "[d]egree to which the action is controversial," *id.* § 1501.8(b)(1)(vii)) by providing an extraordinary review process for a minor transaction. Several of the other factors – "[p]otential for environmental harm," "[s]ize of the proposed action," "[s]tate of the art of analytic techniques," "[d]egree of public need for the proposed action, including the consequences of delay," and "[n]umber of persons and agencies affected," *id.* § 1501.8(b)(1)(i)-(v)) – are all

²³ Even if the Transaction were approved, delayed decision making will have already caused the missing of one construction season for building the infrastructure necessary to fully realize the efficiencies promised by the Transaction. Property acquisition, permitting and other ground work, and orders for track and equipment, some of which require long lead times, remain on hold for the \$100 million in improvements that CN plans for the FJ&E, awaiting the Board's final decision.

²⁴ See *supra* note 13.

accommodated by those limits. In light of the time limits imposed by ICCTA, one of those factors – “time limits imposed on the agency by law, regulations, or executive order,” *id.* § 1501.8(b)(1)(viii) – is especially supportive of deadlines that will not endanger the transaction.

The CEQ rules anticipate that an agency will design its EIS process to accommodate statutory deadlines such as those imposed by ICCTA. And the Board’s predecessor, the ICC, recognized when it promulgated what are now the Board’s environmental rules that its regulatory responsibility under the statute must take precedence over conflicting NEPA-based requirements. *See supra* note 9. For minor transactions, as the Board recognized in Decision No. 2,²⁵ “[t]he Board must issue a final decision” within 180 days of the filing of the application. 49 U.S.C. § 11325(d).

While the Board cannot now issue a final decision within the statutory deadline, which expired on April 28, 2008, that does not render the ICCTA deadline a nullity, and the Board still has a duty to structure any remaining environmental review to accommodate, insofar as possible, the Congressional mandate to proceed expeditiously. “NEPA was not intended to repeal by implication any other statute,” *United States v. SCRAP*, 412 U.S. 669, 694 (1973), and “where a clear and unavoidable conflict in statutory authority exists, NEPA must give way.” *Flint Ridge Dev. Co. v. Scenic Rivers Ass’n of Okla.*, 426 U.S. 776, 788 (1976). Thus, by extending the deadline under ICCTA in order to accommodate the environmental review, the Board has sought to exercise authority not granted by statute, and contravened the purpose of ICCTA’s time limit.

²⁵ Decision No. 2, slip op. at 19, n.20.

by which Congress wanted to permit railroads to consummate minor transactions expeditiously, as Congress had concluded that such transactions were presumptively in the public interest.²⁶

Nonetheless, because CN recognizes the Board's desire to balance thorough environmental review under NEPA with expeditious regulatory review under ICCTA, CN is not here making an academic objection to the Board's decision to undertake a somewhat longer NEPA review than may have been contemplated under NEPA and ICCTA. CN is instead seeking a reasonable and definite end to a process that seems in danger of becoming unreasonably disproportionate to both the issues being reviewed and to the proper role of environmental analysis in STB licensing proceedings for minor transactions. The schedule proposed provides far more time (twice the time allotted by ICCTA) and resources than can reasonably be expected for NEPA review of a minor transaction and is only barely sufficient to permit CN and USS to make the appropriate assessments and close the Transaction by the deadline under the SPA, December 31, 2008, after more than twice the time allotted by ICCTA. Unless the Board acts as requested here, a "cumbersome, slow process of . . . processing merger proposals" will have been reestablished, and Congress's policy of facilitating "change needed in the industry" will have been nullified. See S. Rep. No. 94-499, at 2-3.

IV. Despite Vocal Opposition, the Time Limits Requested by CN are Reasonable

Controversy over shifting trains and their impacts from urban Chicago to the less dense suburbs provides no basis for taking longer to identify and assess those impacts than the period CN has requested. Controversy has not precluded the Board from setting time limits for environmental review in prior control proceedings, and those time limits have not precluded the

²⁶ The limits on NEPA that were recognized in *Flint Ridge*, where the regulated action involved terms for private land sales, applies *a fortiori* here where the regulated action has affirmatively been deemed by Congress to be in the public interest.

“hard look” required by NEPA. In *Conrail* – one of the largest, most complicated control transactions to have ever required Board approval – the time limits established at the beginning of the process, which were adjusted slightly in the course of the proceeding.²⁷ worked well to ensure a thorough environmental review, and also permitted the Board to rule on the merits of the Transaction and the EIS within the statutory time limits of ICCTA. Despite the scope and complexity of the transaction, it took SEA just 11 months from the date the application was filed to serve a final EIS, and slightly more than twelve months from when the applicants submitted their Preliminary Environmental Reports (“PERs”).²⁸

Notwithstanding what one might infer from the vocal opposition of the suburban communities along EJ&E, the environmental impacts of the Transaction are neither novel nor unusually extensive. SEA has established thresholds and procedures for reviewing the impacts – such as crossing delay, noise, and safety – that appear to be of greatest concern to communities. Prior environmental reviews have addressed these issues, and, given the very limited geographic

²⁷ The date initially set for issuance of the Final EIS was late March or early April 1998, *see Conrail*, Notice of Intent to Prepare an Environmental Impact Statement (EIS) and Request for Comments on Proposed EIS Scope, slip op at 6 (STB served July 3, 1997), but the schedule for environmental review was extended by 45 days in order to permit the Draft EIS to include applicants’ safety integration plans (not then required by STB or FRA regulation), and because applicants had made significant changes to the Environmental Report and filed a Supplemental Environmental Report more than two months after the filing of the application. *Conrail*, Decision No. 52, slip op at 1-2 (STB served Nov. 3, 1997). Here, CN’s SIP was timely submitted on December 28, 2007, in accordance with STB and FRA regulations, and no substantial questions have been raised by FRA about the SIP, so there should be no need to extend the environmental review schedule to accommodate that filing.

²⁸ It does not appear that submission of the PERs substantially reduced the time needed by SEA after the filing of the Application for preparation of the EIS in that proceeding. The PERs contained only “preliminary, descriptive information on the proposed transaction,” *Conrail*, Notice of Final Scope of Environmental Impact Statement (EIS), slip op. at 9 n.8 (STB served Oct. 1, 1997), and do not appear to have been reviewed as part of the Draft EIS. *Conrail* Draft Environmental Impact Statement at 1-11 (STB served Dec. 12, 1997) (“*Conrail Draft EIS*”).

scope of the Transaction, analyzing them here should not present any particular difficulty for SEA and its third-party consultants, with their combined resources and expertise.

SEA's environmental review in *Conrail* involved many of the same issues, though on a much larger scale. Applicants there acquired 10,500 route miles spanning 13 states, the District of Columbia, and the Province of Quebec.²⁹ Here, CN is purchasing 158 route miles that span small portions of only two states. In *Conrail*, NEPA review encompassed 289 distinct line segments with increases in traffic; here, there are only 14. In *Conrail*, there were 2,070 grade crossings on those segments with increases in rail traffic above eight trains a day; here there are only 99. Yet despite the complexity and vast geographic scope of the *Conrail* transaction, SEA issued a final EIS just 11 months after the application was filed and only a little over 12 months after the applicants' PERs were filed. As the following chart illustrates, SEA served the Draft EIS in *Conrail* in less time than it took in this proceeding to prepare and serve the Final Scope of Study (contained in the Scoping Order, served April 28, 1998)

Event	Days after Conrail Application Filed	Days after CN/EJ&EW Application Filed	Difference
Service of Draft Scope	14	52	+ 38
Scoping Comments End	44	108	+ 64
Service of Final Scope	100	178	+ 78
Service of Draft EIS	172	???	???
Draft EIS Comments End	217	???	???
Service of Final EIS	340	???	???

The disparity between the two procedural schedules is heightened by the fact that the Transaction here is significantly less complex than the transaction reviewed in *Conrail*. While this Transaction involves some of the same generic, fact-based issues as *Conrail* (safety, noise, grade crossing interference, etc.), the scale and geographic scope are orders of magnitude smaller

²⁹ 1 Final Environmental Impact Statement at 1-20, *Conrail* (STB served May 23, 1998) ("*Conrail Final EIS*").

and there are significantly fewer locations needing analysis. The following table illustrates some of those differences in complexity.

Area of Analysis	CONRAIL ³⁰	CN/EJ&EW ³¹
Route miles acquired	10,500 miles	158 miles
Cost of acquisition	ca. \$10.0 billion	\$300 million
States in which operational changes would occur	24 and DC (DEIS, ch. 5)	2
States in which rail activities would exceed threshold for analysis	22 and DC (1 FEIS, Table 2-2)	2
Counties in which operational changes would occur	1,061 (1 DEIS at 4-3)	5
Counties where rail activities would exceed threshold for analysis	188 (1 DEIS at 4-3)	5
Rail segments evaluated	1,022 (1 FEIS at 2-7)	44 (Attachments A.1 & A.2)
Mileage of segments evaluated	35,733 miles (5A DEIS, App. A-1)	303 (158 EJ&EW; 145 CN)
Number of rail segments with increases in traffic	289 (FEIS at ES-2)	16 (14 EJ&EW, 2 CN)
Number of segments that meet or exceed a threshold for environmental analysis	317 (1 FEIS at 2-7)	14 (14 EJ&EW)
Mileage on segments that meet or exceed a threshold for environmental analysis	13,326 miles (1 FEIS, Table 2-2; 5A DEIS, App. A-1)	105 miles
Number of grade crossings on segments with 8 or more additional freight trains/day	2,070 (1 DEIS at 3-10)	99 (all EJ&EW)
Number of grade crossings on segments that meet or exceed the Board's thresholds for environmental analysis	278 (2 FEIS at 4-29) (6B FEIS at G-1 – G-19)	52 (where ADT > 5,000) 71 (where ADT > 2,500)
Number of rail segments that meet or exceed the Board's threshold for analysis of passenger rail operations	91 (2 FEIS at 4-18)	0

³⁰ The parentheticals refer to the volume and page numbers of the Final EIS ("FEIS") and Draft EIS ("DEIS") issued in the *Conrail* proceeding.

³¹ Does not include CN segments outside the EJ&E arc, on which Applicants project minimal increases of tonnage (between 19 and 2,256 tons/day) as a result of extended hauls arising from the Transaction and which, under the Board's rules, do not warrant NEPA review.

Mileage on rail segments shared by passenger and freight trains on which freight traffic would increase by 1 train/day or more	3,573 (5A DEIS, Att. B-2)	0 miles
Rail yards with activity increases that meet or exceed the Board's thresholds for environmental analysis	15 (1 FEIS at 2-21)	2
Intermodal facilities that would experience increases that meet or exceed the Board's thresholds for environmental analysis	24 (1 FEIS at 2-18)	0
Rail line abandonments	3 (1 FEIS at 2-25)	0
New rail connections analyzed by SEA	15 (1 FEIS at 2-22)	6 (all non-jurisdictional)

Looking forward, there are only four differences in the scope of study or procedures between *Conrail* and this proceeding. While these changes all entail variations from precedent, they appear to add little or nothing to SEA's workload, nor to provide any other reason for delay beyond the deadlines here requested by CN

First, SEA has decided to use projections of vehicular and rail traffic beyond the implementation period of the Transaction. In terms of vehicular traffic, CN understands the necessary data are readily available (from such sources as the Metropolitan Planning Organization ("MPO") and Illinois Department of Transportation). And, as explained in detail in CN's response to SEA Information Request No. 3, filed April 21, 2008, for purposes of environmental review, the rail traffic volumes stated in CN's Operating Plan are a reliable and appropriate proxy for any reasonably foreseeable growth in rail traffic through 2015.

Second, SEA also decided to reduce the thresholds for grade crossing delay analysis. There are only a total of 99 public crossings on the portion of EJ&E that CN is acquiring, of those, 71 have an ADT above 2,500. In contrast, there were 2,070 grade crossings considered by SEA in *Conrail*, and 278 had an ADT above 5,000 (which was then the threshold for analysis).

Adding new crossings should not appreciably add to the amount of work for SEA or its consultants, either to determine the level of significance or to make any assessment of mitigation that might be warranted should impacts exceed a threshold of significance.³²

Third, SEA decided to loosen the criteria for including anticipated commuter rail projects by studying those where capital improvements have merely been “approved” (as opposed to those that have been “planned, approved, and funded” as done in *Conrail*)³³ While project approval without funding is no assurance that the project will ever be realized, CN, which is in regular communication with the relevant commuter agencies, is nonetheless unaware of any approved projects that might be affected by the Transaction that should be expected to prevent SEA from expeditiously completing its review.

Fourth, SEA has decided to hold discretionary meetings during the comment period on the Draft EIS. These should not materially delay SEA, and may even provide an opportunity for SEA to receive feedback on the Draft EIS that it can begin to address before it receives the bulk of the comments filed at the end of the period for comment on the Draft EIS

While there is no apparent reason in the substantive work required by NEPA for the review process to run past the deadlines proposed here by CN, some will undoubtedly argue that delay will be required to respond to the sheer volume of opposition and political pressure emanating from certain villages and towns along EJ&E that will experience increases in rail traffic. The Board should ignore any such arguments for at least three basic reasons.

³² See 5A *Conrail Draft EIS* at C-10 through C-19 (describing the formulas used to calculate various impacts at grade crossings)

³³ See 2 *Conrail Final EIS* at 4-109 (STB served May 23, 1998), and SEA’s draft scope of study in this proceeding Notice of Intent to Prepare an Environmental Impact Statement (EIS), slip op. at 8 (served Dec. 21, 2007)

First, as explained above, they would fly in the face of ICCTA, NEPA, and the rules promulgated under NEPA by the Board and CEQ, which at best permit some accommodation of controversy (which the Board has already done) but explicitly reject the notion that controversy trumps the need to conduct efficient, professional analyses, and meet explicit statutory deadlines

Second, given the resources available to the Board, and that NEPA merely requires an identification of impacts and appropriate remedies, not a resolution of controversy, the expected volume of further comments should not require delay. SEA should be able to use to a great extent the same thresholds, procedures, and analysis as in previous environmental reviews, so there should be nothing in the Draft EIS that would catch potential commenters by surprise. Thus, the proposed month and a half for comments on the Draft EIS should provide ample time

Third, because there are only so many valid environmental issues, most comments, if the past pattern holds true, are likely to be largely redundant, and SEA can anticipate them and combine responses to the extent they raise the same issues.³⁴

In any event, the Board and the public interest have nothing to gain from controversy-induced delay. Further delay will not lessen controversy but will likely be used by opponents to try to increase and extend controversy. As described in CN's letter to SEA of April 15, 2008, *outlining its extensive community outreach efforts*,³⁵ CN has actively engaged many communities along the EJ&E arc that have raised concerns about environmental impacts, but after some initial progress, as the environmental analysis has dragged on, CN has seen

³⁴ See *Citizen's Guide*, *supra* note 15 (stating that CEQ recognizes that "[n]umerous comments that repeat the same basic message of support or opposition will typically be responded to collectively").

³⁵ Letter from Karen Borlaug Phillips, Vice President, North American Government Affairs, Canadian National Railway Company, to Victoria J. Rutson, Chief, Section of Environmental Analysis, Surface Transportation Board (Apr. 15, 2008) (attached as Exhibit 4).

communities adopt increasingly rigid and obstructionist approaches to discussions³⁶ Delays, unrealistic expectations, and the lack of any established schedule for environmental review appear to have fueled hopes that the continuation of the environmental review process might itself be exploited to stop the Transaction entirely Though CN believes the concerns raised by some of the more vocal local activists are largely overstated or unsupported, it continues to reach out to the affected communities in the hope of reaching some agreements, and has made an unprecedented commitment of a budget of \$40 million – a full 13% of the acquisition cost of EJ&EW³⁷ – to support mitigation efforts for those communities.

CN is working hard to ensure that the substantial public benefits from the Transaction can be realized However, despite CN's best efforts, the uncertainty and delay of the environmental review process is putting those public benefits at risk. The Board should not let those positive benefits go unrealized due to a committed, vocal group of apparently well-financed opponents attempting to use NEPA as a tool to delay regulatory approval of the Transaction, in the hopes of preventing its ultimate consummation. The Board has an administrative and public interest

³⁶ An unbounded environmental review process also gives opponents of the Transaction, who know that the analysis by the Board's third-party contractor must be funded by CN, every incentive to make as many claims as possible, which SEA and its consultants will then have to spend CN's money to address, to the point where CN might conclude that pursuing the benefits of the Transaction is no longer prudent. These tactics should not be encouraged. In addition to the significant opportunities that SEA has provided to date for interested parties to provide input to SEA, *responsible commenters have had many months to develop their views and should be able to express them in response to the Draft EIS in a month and a half.* Moreover, any cost attributable to controversy, as opposed to professional analysis, unnecessarily reduces the amounts that CN can afford for mitigation, which produces far larger and more direct public benefits, and makes alternatives to the Transaction more attractive

³⁷ In fact, CN now expects the total environmental costs, including its own expenses as well as those related to third parties for SEA review and investments for reasonable mitigation to exceed \$60 million, or more than 20% of the EJ&EW acquisition cost

obligation to review the Transaction as efficiently and expeditiously as possible, especially now that it has failed to meet the statutory deadline for approving the Transaction.

Accordingly, CN requests the Board to adopt the following schedule for the remaining environmental review processes:

- Draft EIS served July 15, 2008
- Draft EIS comments due September 2, 2008
- Final EIS served November 3, 2008
- Final decision served December 1, 2008

Adopting this schedule will allow the Board 259 days between the filing of the Application and the service of the Draft EIS – three months longer than the comparable period in the *Conrail* proceeding. It will give the Board two months to review the comments on the Draft EIS and incorporate them into the Final EIS. And, assuming that the Transaction is approved without unacceptable conditions, it would allow Applicants to close on the Transaction consistent with the deadline under the SPA.

This Transaction would significantly benefit the public interest in an efficient and reliable rail transportation system, and is a major effort to partially remedy rail congestion in Chicago. As noted in the environmental comments of NS and UP, similar transactions are likely to continue to occur both in Chicago, as funding for regional solutions such as CREATE is scarce, and nationally, in order for rail to remain competitive with trucks. Over-crowding of the nation's highways is already a significant problem, and it will only become worse if rail does not remain a viable competitive option to trucking. Accordingly, it is important to assure others seeking to enhance railroad efficiency that their plans will receive expeditious regulatory review. Imposing

reasonable deadlines for environmental review in this proceeding is a modest step that could go a long way to remedying a problem that has national implications.

V. Conclusion

For these reasons, CN respectfully requests that the Board impose the time limits set forth herein. These time limits will reduce the risk that the public benefits of the Transaction are lost; they are required by CEQ regulations, they will limit the impact from the Board's failure to meet the statutory deadline for review of the Transaction; and they are sufficient for SEA to prepare an EIS that is consistent with NEPA's requirements.

Respectfully submitted,



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*Counsel for Canadian National Railway Company
and Grand Trunk Corporation*

May 13, 2008

EXHIBIT 1

MEMORANDUM OF UNDERSTANDING
AMONG
SURFACE TRANSPORTATION BOARD,
CANADIAN NATIONAL RAILWAY COMPANY,
AND
HDR INCORPORATED

RE: ENVIRONMENTAL ANALYSIS AND PREPARATION OF APPROPRIATE ENVIRONMENTAL DOCUMENTS RELATING TO THE CANADIAN NATIONAL / ELGIN, JOLIET, AND EASTERN MERGER (CN/EJE MERGER)

I. Introduction and Purpose

A Canadian National Railway Company ("Applicant") intends to file an application ("Application") in STB Finance Docket No. 35087, seeking authority from the Surface Transportation Board ("Board") to acquire control of EJ&E West Company ("EJ&EW")

B In considering the Application, the Board will consider the potential environmental impacts resulting from Applicant's proposed control of EJ&EW and its integration of EJ&EW rail operations with Applicant's existing operations (the "Proposal"). The Board will be the lead agency for preparing the environmental documentation required for the Transaction, either an Environmental Impact Statement ("EIS") or Environmental Assessment ("EA"), as required by the National Environmental Policy Act of 1969 ("NEPA"). Pursuant to 40 CFR 1506 5(c), 49 CFR 1105 4(j), and 1105 10(d), the Board, through its Section of Environmental Analysis ("SEA"), has selected and Applicant has agreed to engage, at Applicant's expense. HDR Incorporated as the Independent Third Party Contractor ("Contractor") for this Proposal Contractor shall assist SEA in conducting the environmental review

VI. Work Plan

- A Contractor, in consultation with SEA and Applicant, shall submit a draft Work Plan to SEA for preparing the required environmental documentation within forty-five (45) days after all parties have signed this Memorandum. The draft Work Plan shall contain at least the following elements**
- (1) A description of all work to be performed (including preparing and sending consultation letters, participating in public and agency meetings; outlining and drafting environmental documents, reviewing, analyzing, and summarizing public comments, conducting analyses, etc.).**
 - (2) The projected schedule for completing the various tasks described**
 - (3) Identification of Contractor's staff members who will be responsible for preparing, analyzing, and reviewing the work**
 - (4) An outline of the environmental analysis**
- B. Following receipt of the draft Work Plan, SEA, in consultation with Contractor and Applicant, shall finalize the Work Plan in a timely manner.**
- C Subsequent to consultation with Contractor and Applicant, SEA may amend the Work Plan from time to time as the environmental review of the Application may necessitate. The parties hereto shall consult at least once every two weeks to confirm that the Work is being performed in the most efficient and cost-effective manner and to consider possible measures to improve the efficiency and cost effectiveness of performance of the Work**

C. Both Applicant and Contractor shall immediately notify SEA of any attempt by either party to modify or terminate the contract between Applicant and Contractor. Termination of the Contract shall be subject to SEA's prior approval, after consultation with Applicant and Contractor. Upon approving termination of the contract, SEA shall endeavor to replace Contractor with another qualified Contractor as soon as practicable. Notwithstanding the foregoing, Applicant may terminate the contract without SEA's approval in the event that it withdraws its notice of intent or Application.

IX Modification

This Memorandum of Understanding may be modified only by written amendment executed by SEA, Applicant, and Contractor.

CANADIAN NATIONAL RAILWAY COMPANY

By: *[Signature]*

Title: *AVP*

Date: *Dec. 4/07*

HDR INCORPORATED

By: *[Signature]*

Title: *Sr. V. P.*

Date: *11/29/07*

SURFACE TRANSPORTATION BOARD

By: *[Signature]*

Title: *Chief, SEA*

Date: *Nov. 27 2007*

EXHIBIT 2

**UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No 35087

**CANADIAN NATIONAL RAILWAY COMPANY
AND GRAND TRUNK CORPORATION
- CONTROL -
EJ&E WEST COMPANY**

**ENVIRONMENTAL COMMENTS
OF NORFOLK SOUTHERN RAILWAY COMPANY**

Norfolk Southern Railway Company ("NS") respectfully submits these comments in response to the December 21, 2007 decision of the Board's Section of Environmental Analysis ("SEA") requesting comments on the scope of the environmental impact statement ("EIS") to be prepared in this proceeding

NS submits these comments to urge the Board to consider the important national need for rail capacity growth when weighing the environmental impacts of proposed transactions and potentially costly mitigation measures. The Board's statutory obligations require it to consider the needs of the national transportation network—including the urgent need for capacity improvements—and the Board should not elevate local environmental concerns to a place where they trump the national interest

The Board's duty under the National Environmental Policy Act ("NEPA") to consider the environmental impact of a transaction is only one of its competing statutory obligations. NEPA requires the Board to take a "hard look" at environmental consequences before taking a major action. *See Baltimore Gas & Elec Co v National Res Defense Council*, 462 U.S. 87 (1983). Thus, the Board is only obligated to *consider* the environmental impacts of

major actions, it is not required to mitigate every conceivable environmental concern raised by a party. This is important because of the other requirements Congress has imposed: to approve transactions that do not involve the merger or control of two Class I railroads where the public interest in the transaction outweighs any anticompetitive effects, *see* 49 U.S.C. § 11324(d), and to carry out the rail transportation policy to “ensure the development and continuation of a sound rail transportation system” 49 U.S.C. § 10101(4). The EIS process should not overshadow these congressional mandates. While the Board has a duty to consider environmental impacts and to impose appropriate mitigation when necessary, the EIS process should not become the tail that wags the dog by or distract the Board from its core statutory obligation to carry out that national rail transportation policy.

In particular, the Board should be mindful of the pressing national need for increased rail capacity. As the Board has recognized, there is a critical need for capacity improvements to accommodate the projected steep increases in rail traffic over the coming decades. *E.g.*, Ex Parte 671, *Rail Capacity and Infrastructure Requirements*, (Mar. 6, 2007). The American Association of State Highway and Transportation Officials projected that freight tonnage will grow by almost 57 percent between 2000 and 2020. AASHTO, *Freight Rail Bottom-Line Report*, at 2. The U.S. Department of Transportation has estimated that rail freight traffic will grow by 35% between 2005 and 2020, and that rail freight traffic could grow even faster if highway congestion drives more freight from trucks to rail. Ex Parte 671, Comments of U.S. Dep’t of Transp. at 3 (Apr. 11, 2007). Whichever estimate is correct, one thing is clear—railroads must add substantial additional capacity in order to handle these projected traffic increases. Solving these capacity constraints is not only important for network fluidity and traffic flow, it also has wide-ranging implications for public safety and for national

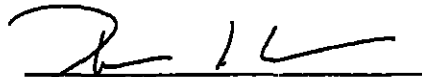
environmental policy Limited rail capacity will require more freight to move via truck transportation, with corresponding effects on both highway congestion and air quality.

The need for rail capacity improvements is particularly acute in the Chicago area. All but one of the Class I railroads have main lines and major yard facilities in the Chicago area, and commuter trains and Amtrak trains operate over many of the key rail corridors. Significant investments in capacity are required in the coming years. Many of those investments are contemplated in the Chicago Region Environmental and Transportation Efficiency Program (CREATE) plan, a consensus plan for a series of infrastructure projects to improve routings, freight flows, and the efficiency of the rail network. The CREATE plan was developed by all the major railroads that operate in Chicago, the City of Chicago, the State of Illinois, METRA, and Amtrak through a unique and groundbreaking process to develop the best plan to solve capacity constraint issues in the Chicago region. This plan calls for \$1.5 billion of private and public investment—much of which has yet to be committed—and will require significant capital expenditures by the City, the State, and the Federal government, and the rail carriers in the Chicago area.

Railroads do not have unlimited funds for capital expenditures. Indeed the recent study entitled “National Rail Freight Infrastructure Capacity and Investment Study,” which was prepared by Cambridge Systematics, demonstrated that the capacity needs of the rail industry over the next 28 years are greater than the funds the study estimates the railroads will have available. See National Rail Freight Infrastructure Capacity and Investment Study at 7-6. Therefore, when the Board considers proposed environmental mitigation measures it should balance the need for those measures and their cost against the critical national need for investment in capacity improvement projects. Put differently, the Board should consider the

national effect on the rail network and on the environment from constrained rail capacity—not simply claimed environmental impacts on the immediate local area. The Board certainly should be responsive to local concerns, but it is responsible for the national transportation network and in the environmental phase of this proceeding it should give appropriate weight to those national needs before imposing any proposed mitigation measures.

Respectfully Submitted,



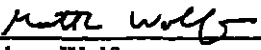
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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of February, 2008, I served by first class mail,
- postage prepaid, a copy of the foregoing on all parties of record listed in the official service list
in this proceeding



Matthew Wolfe

EXHIBIT 3

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35087

**CANADIAN NATIONAL RAILWAY COMPANY
AND GRAND TRUNK WESTERN CORPORATION
– CONTROL –
EJ&E WEST COMPANY**

**ENVIRONMENTAL COMMENTS
OF
UNION PACIFIC RAILROAD COMPANY**

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Dated & Filed: February 15, 2008

FINANCE DOCKET NO. 35087

**CANADIAN NATIONAL RAILWAY COMPANY
AND GRAND TRUNK WESTERN CORPORATION
-- CONTROL --
EJ&E WEST COMPANY**

**ENVIRONMENTAL COMMENTS
OF
UNION PACIFIC RAILROAD COMPANY**

Union Pacific Railroad Company ("UP") submits these Comments in response to the December 21, 2007 decision of the Board's Section of Environmental Analysis ("SEA") requesting comments on the scope of the environmental impact statement (EIS) to be prepared in this proceeding. UP's concern is not the specific subjects SEA is proposing to consider. Rather, UP's concern is how the Board will deal with the broadly defined environmental issues that are being raised. The way the Board handles these issues will have major implications, not only in the Chicago area, but in future proceedings throughout the nation. In projects requiring Board approval, it will determine whether railroads will be able to effectively add capacity to handle the traffic demands likely to be placed on them in the future, or whether the Board will allow these projects to be impaired by local interests opposed to additional train traffic.

UP takes no position on the underlying transaction, and these Comments should not be read as expressing a view on its transportation merits. UP is also not aware of voluntary environmental mitigation measures the applicants may have agreed to, or may

be discussing with other parties, and is expressing no view on the propriety of any such measures

1. The Transaction

CN is proposing to obtain control of EJ&E, an underutilized belt railroad running around Chicago through an area which, until recent years, was largely rural.¹ CN intends to make improvements to EJ&E with private capital and reroute traffic from existing CN routes to EJ&E to address some of the capacity problems CN and other railroads are facing in the Chicago area. Based on the filings and public meetings to date, the transaction has generated substantial opposition by local interests who are concerned about the increased rail traffic that CN would eventually route over EJ&E, and who are seeking either to defeat the transaction or impose expensive environmental mitigation conditions on it.

2. The Environmental Standard

Under the National Environmental Policy Act, an agency is obligated to consider "every significant aspect of the environmental impact of a proposed action." It appears from SEA's December 21 decision that this is precisely what SEA and the Board intend to do. However, NEPA does not require an agency to elevate environmental concerns over all other appropriate considerations. It requires only that the agency take a "hard look" at environmental consequences before taking a major action. See, e.g., Baltimore Gas & Electric Co. v. National Resources Defense Council, 103 S. Ct. 2246, 2252 (1983). In other words, the Board is not required to deny a transaction because parties have raised

¹ As discussed in the comments filed by the Small Railroad Business Owners of America, EJ&E historically handled more train traffic than it does today.

environmental concerns, or adopt mitigation measures to address every such concern. All that is required is that the Board take a "hard look" at these concerns and make a considered decision as to what, if any, responsive action is warranted.

3. The Board's Obligation To Promote Adequate Rail Capacity

The Board has another statutory obligation. Among the directives of the Rail Transportation Policy is that the Board "ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense", 49 U.S.C. 10101(4); Ex Parte No. 671, Rail Capacity and Infrastructure Requirements, (decision served March 6, 2007, p. 2). In the current, capacity constrained environment the railroads now face, both on a national level and especially in the Chicago area, this means that the Board must be part of the solutions to rail capacity problems and not an obstacle to these solutions.

There is no question that railroads need to add substantial additional capacity if they are to be able to handle future traffic. As the Board itself has noted, railroads experienced a 50% increase in traffic between 1990 and 2003, Ex Parte No. 671, supra, pp. 1-2. The U.S. Department of Transportation forecasts that rail freight traffic will grow by 35% between 2005 and 2020 if highway traffic growth is unconstrained by congestion, and *substantially more if highway congestion or public policy drives more freight from road to rail*².

The capacity to handle that traffic does not presently exist. It must be added, it must make financial sense, and it must be paid for. Unlike capacity enhancements in other

² Ex Parte No. 671, Comments of U.S. Department of Transportation, April 11, 2007, p. 3

transportation modes, rail capacity enhancements usually must be funded by the railroads themselves. While public-private partnerships have been successfully used for several important rail projects, they have, to date, been the exception rather than the rule. Because most rail capacity projects are funded by the railroads, there is no large pool of private capital available to pay for endless delays or expensive mitigation measures.³

Capacity improvements are especially important in the Chicago area. Chicago has been an important railroad center since the earliest days of the industry, and Chicago owes its status as one of the world's great cities to the web of railroads that serves it. Every Class I railroad except KCS has one or more main lines and major yard facilities serving the Chicago area. As discussed in the following section, most of these lines are heavily utilized, with far more train traffic than CN is proposing to route over EJ&E.

Today, Chicago has become a major chokepoint in the U.S. rail network. The Chicago rail infrastructure requires large investments to handle not only present and projected rail freight traffic, but also the commuter and intercity rail passenger services that operate over and across many of the key rail corridors. As the Board is aware, this has been recognized both by the railroads and by public authorities, and one of the solutions was to be the ambitious CREATE project. The project called for \$1.5 billion of private and public investment to revise and modernize Chicago's rail infrastructure. However, to date, only a small portion of the funding required for CREATE has been committed. Unless this

³ UP has itself experienced important capacity projects which have been defeated or delayed by local opposition, some of which are described in UP's Comments in Ex Parte 671 (April 4, 2007, pp. 19-22). One example is a recent "Rockview-Sikeston" project in Missouri for a "line swap" between UP and BNSF, which would have allowed UP increase capacity without extensive new construction. This project was killed because of objections to additional rail traffic by Sikeston, MO. Another example is our ongoing effort to double track our capacity-constrained "Sunset Route" through Arizona, which is being stymied by Arizona Corporation Commission processes and delays. Comments from some members of -ACC make clear that they want to force UP to pay for multiple grade crossing separations along the route costing tens of millions of dollars, even where road traffic is light.

changes, the railroads themselves will have to find and fund their own solutions, and making better use of rail lines which are currently underutilized is an obvious approach.

The Board needs to be extremely careful not-to-prevent, -delay or discourage solutions to Chicago's capacity problems simply because they increase rail traffic on particular rail lines. The alternative is that Chicago will eventually become gridlocked, and the effects will ripple throughout the regional and national rail network and economy

4. How The Board Should Respond To Concerns About Increased Rail Traffic

As previously discussed, most of the environmental concerns being raised in this proceeding involve the effects of increased rail traffic on EJ&E's currently underutilized rail lines ⁴ There will, of course, be traffic increases on EJ&E (as well as offsetting traffic decreases on other Chicago area rail lines currently used for CN traffic). This increased traffic will likely have effects that many local residents see as undesirable, and they prefer that the status quo be preserved. But the ultimate question for the Board should be whether any of these effects are so unusual and severe that they require denial of the transaction, or expensive mitigation measures. Based on what UP knows about rail lines and traffic in the area, neither denial nor extensive mitigation appears to be justified.

According to its application, CN intends to operate roughly 20-45 trains a day over EJ&E (the amount varies by segment, roughly 20 trains per day would run through the

4 As the Board knows, railroads are normally free to increase train traffic on their lines without any regulatory approval, see, for example, Docket No. AB-33 (Sub-No. 183), Salt Lake City Corporation - Adverse Abandonment, decision served March 6, 2002, pp. 8-9 and cases cited. As such, even if this transaction does not go forward, there's no guarantee that the rail traffic on EJ&E will remain at current low levels. For example, using interline rates or haulage arrangements, EJ&E could add the same number of trains that CN is proposing to add without any environmental review.

Barrington area). It is this level of traffic which, according to some parties, will cause major disruptions all along the EJ&E corridor.

How does this compare to other rail lines in the area served by EJ&E? UP's Chicago-Omaha main line (which crosses EJ&E at grade at West Chicago) travels through the west side of Chicago and Chicago's western suburbs and handles over 100 trains per day. The portion of this line between River Forest and Geneva (about 25 miles) runs through a nearly continuous string of suburbs, at grade, and with numerous rail-highway grade crossings, many of which are heavily used by highway traffic. Many of these suburbs were developed in the late 19th and 20th centuries, and the railroad runs right through the centers of the towns. The area is far more built up than the EJ&E corridor.

A few miles south of the UP line is a major BNSF main line, which crosses under EJ&E at Eola. The BNSF line similarly runs at grade through a string of Chicago suburbs beginning at Berwyn, IL, and extending to Aurora, IL, with numerous, heavily used grade crossings. Some of these suburbs (e.g., Hinsdale) are very similar to Barrington. The BNSF line actually handles more rail traffic than the UP line - over 130 trains a day.⁵

Other rail lines in the Chicago area also handle heavy amounts of rail traffic. For example, the CP-NIRC (Metra) line running from Chicago northwest to Elgin handles 86 trains per day, the CP-NIRC (Metra) line from Chicago north to Roundout handles over 82 trains per day, the UP line running northwest from Chicago to Harvard handles over 66 trains per day through Barrington; the UP line running north from Chicago to Waukegan and Kenosha handles 55 trains per day. Again, all of these lines operate at grade beyond

⁵ Train counts derived from USDOT grade crossing inventory data on FRA Quiet Zone Calculator website, <http://safetydata.fra.dot.gov/quiet/>.

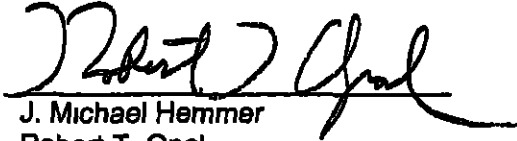
Chicago city limits, with numerous, heavily used grade crossings. The railroads and the communities along these lines, and others in the Chicago area, have coexisted for decades

In short, in reviewing the EJ&E transaction, the Board should compare and contrast it to existing rail operations through the Chicago suburbs. The fact is that the number of trains CN intends to route on EJ&E is low compared to most other main lines serving the area. There may be special situations at some specific locations on the EJ&E route which require focused mitigation measures. If so, these should be addressed as SEA performs its analysis. But the Board should not impose extraordinary mitigation measures for the relatively low volumes of traffic involved in this proceeding, and the Board should carefully balance the costs of mitigation against the critical national and regional need for more rail capacity.

CONCLUSION

In the environmental phase of this proceeding, the Board must weigh the local concerns against the benefits of capacity improvement projects that require STB approval. That is a critically important issue to the nation's railroads and the shippers they serve. If the Board is serious about encouraging the creation of additional rail capacity, then the Board should use extreme caution in burdening capacity growth. The alternative is that an increasing share of the nation's freight traffic will be forced to move by truck rather than by rail.

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CERTIFICATE OF SERVICE

I certify that I have this day served a copy of the foregoing document upon all parties of record, as listed in the Board's decision served January 25, 2008 in this proceeding. Service was made by first class United States Mail.

Dated at Omaha, Nebraska this 15th day of February, 2008


Robert T. Opal

EXHIBIT 4



Walter Brang Philippe
President, CN

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April 15, 2008

BY HAND

Ms Victoria J Rutson
Section of Environmental Analysis
Surface Transportation Board
395 E Street, S W
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Dear Ms Rutson

As SEA and HDR continue to advance the environmental review of the CN/EJ&F transaction, I wanted to report on CN's ongoing efforts to inform State and local government officials and other entities about the transaction, and to engage affected communities along the E&E and address their concerns

Since the transaction was announced on September 26, 2007, and we filed the application for approval of the transaction with the STB on October 30, 2007, CN has met with dozens of Illinois and Indiana State legislators and/or their staffs, as well as the Illinois and Indiana Governors' offices and other State government officials and their staffs. We have also met with local Illinois and Indiana officials, including the Mayor of Chicago, the Chicago Department of Transportation, City Aldermen, planning agency officials, and numerous village, town, city and county elected officials, board members, and staffs in the broader Chicago and northwest Indiana region. We continue to meet and advise the Illinois and Indiana Congressional delegations and those in neighboring States in which CN operates. We have also been in contact with CN customers and a broad range of groups representing the business community and users of rail service. And we continue to meet with Amtrak and Metra to discuss and resolve important passenger service issues, and with E&E and Gary Airport to resolve line relocation issues and safety issues.¹

¹ CN represented to the STB in its March 13 reply comments as well as to Amtrak and Senator Richard Durbin that, should the transaction be approved, Amtrak may continue to operate over a key 13-mile portion of CN's St. Charles Air Line route indefinitely after CN's trains are re-routed

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Early in the regulatory process, CN committed to actively reach out to the communities along the EJ&E that could be affected by the transaction. Two teams were designated, led by senior level CN managers and supported by Parsons, our engineering consultant. The teams are supported by all of the required departments within CN and have been charged with expeditiously investigating projected impacts and discussing possible mitigation measures in a fair and thorough manner.

We scheduled an initial round of meetings with municipal leaders to begin immediately upon the conclusion of the STB scoping sessions (January 22, 2008), and we met with 30 of the 33 affected communities along the EJ&E line in the several weeks following.² Our goals for the initial meetings were to explain the transaction's scope and projected variance in train activity, answer questions about the STB process, CN operations, and the railroad industry, listen to local concerns and detail those issues that required a CN response, provide a point of contact within CN for questions and follow-up, and, if appropriate, provide resources to jointly investigate impact issues and possible mitigation measures.

The meetings have been well attended, and CN has generally received acknowledgement that our efforts have been useful and appreciated. The communities have been represented by mayors and other elected officials, municipal administrators, department heads, and occasionally chamber leaders. CN also accepted invitations to attend several public information sessions hosted by communities, and in upcoming meetings, CN's emergency response team will meet with the police and fire chiefs of communities in Lake and Will counties.

off this line until an alternative acceptable to Amtrak becomes available, at costs to be capped at the current level (indexed only for inflation) and at the level of operating standards that Amtrak currently enjoys. This satisfies all of the conditions Amtrak requested of the STB and would preserve Amtrak's access to Chicago's Union Station and enable Amtrak to continue service to and from nonstate Illinois points such as Champaign and Carbondale in the same manner it does today.

CN and Metra have also been cooperatively engaged in productive dialogue. Among various issues, CN has represented to Metra that it would consider all alternatives for implementing Metra's proposed STAR line service, including use of the same enhanced EJ&E line. Further, significant progress continues to be made in discussions with Gary, A report

² Two of the three remaining communities (Long Grove and Deer Park) did not respond to our invitations; we have now scheduled a meeting with the third community (Hawthorn Woods) for April 23, 2008.

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Based on specific input from the communities, CN asked Parsons to make a preliminary assessment of possible mitigation efforts. CN began a second round of meetings in the first week of April with the intent of discussing various available options. CN has already publicly announced that it anticipates committing approximately \$40 million for mitigating the impacts of increased train traffic along the EJ&E line with respect to such impacts as noise and traffic at grade crossings. (This is in addition to the \$300 million purchase price for the EJ&E and \$100 million the Company has already pledged for infrastructure improvements on the EJ&E line.) CN is prepared to review with each community specific mitigation measures based on industry engineering standards and criteria previously used by SEA for evaluating community impacts, but we are also open to considering other approaches to meeting each community's concerns. We believe that the impacts flowing from the transaction are manageable and can be reasonably addressed.

As you can see, CN has been fully engaged. And we expect our efforts to be productive to the extent our efforts are matched with similar efforts and realistic expectations from other stakeholders.

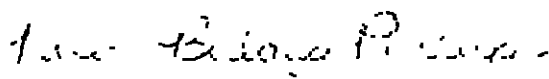
In this regard, the more that all parties perceive that that SEA is conducting a thorough yet expeditious review under clear standards in a well defined period, the more we expect to be able to engage in productive negotiations with the affected communities. There are, however, voices in some communities urging that political action rather than disciplined efforts to negotiate effective mitigation will lead to an indefinite review process that, together with economically unreasonable mitigation demands, will ultimately result in CN's abandonment of the transaction.

We hope you will agree with us that this advice is unwarranted and counterproductive. Certainly, CN is dedicated to implementing the transaction. We believe, as so many have recognized in the record before the agency on the substantive transportation issues, that the absence of harms to competition and the substantial contribution that the transaction will make to shippers in the region, and the broader public interest require that the transaction be approved and that its benefits be realized as soon as expeditious environmental review will permit.

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We appreciate that SEA and HDR are making a committed effort to advance this environmental review, and we will continue to work with you to provide whatever information you may require to complete that review expeditiously.

Sincerely,



Karen Berlaug Phillips
Vice President
North American Government Affairs

cc Chairman Charles D. Nottingham
Vice Chairman Francis P. Mulvey
Commissioner W. Douglas Buttrey
Mr. John Morton, HDR
Mr. Normand Pellerin, CN

CERTIFICATE OF SERVICE

I certify that I have this 13th day of May, 2008, served copies of Applicants' Request for Establishment of Time Limits for NEPA Review and Final Decision upon all known parties of record in this proceeding by first-class mail or a more expeditious method.


Jared H. Powell